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of the United States

OCTOBER TERM, 1978

No. 77-1134

UNITED STATES OF AMERICA,

Appellee,

vs.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W. A. GROFF, as Director of Revenue of and for the State of Montana, and his successors in office,

Appellants.

On Appeal From the United States District Court for the District of Montana

Brief of the States and Territories of Virginia, Arizona, North Dakota, Alaska, Nebraska, Maryland, Hawaii, Nevada, Oregon, Alabama, Wyoming, Guam, Washington, Arkansas, Florida, West Virginia, Iowa, Idaho, New Mexico, Indiana, Puerto Rico, Colorado, and Michigan as Amici Curiae in Support of Appellant.

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I.
INTRODUCTORY STATEMENT

This brief is submitted by the signatory states as Amici Curiae in support of the Brief of the Appellants in the

above captioned case. This brief being sponsored and filed by the aforementioned states; consent to its filing is not required. United States Supreme Court Rule 42(4).

II.

OPINIONS BELOW

The opinion of the 3-judge District Court for the District of Montana, Helena Division, is reported at 437 F. Supp. 354 (1977). Copies of that opinion, and the unreported opinion entered by said court on November 18, 1974, are appended to Appellants' Jurisdictional Statement as Appendix pp. 5-35, and pp. 65-75.

III.

INTEREST OF AMICI CURIAE

The interests of the states joined as Amici in this brief, revolve around what is believed to be the far reaching effects of this opinion as it relates to the question of state taxation of independent contractors performing work for the United States of America, (federal government).

The finding of the District Court majority, viz., that a constitutional infirmity exists in a tax levied upon independent contractors performing work for the federal government, because said tax generates income for the taxing state, clearly has serious consequences for states other than Montana. As the argument contained herein will demonstrate, such a position is not consistent with the previous decisions of this Court.

It is essential that this Court at this time reaffirm constitutional standards previously established, so as to allow the legitimate and continued state taxation of independent contractors performing work for the federal government.

IV.

ARGUMENT

Several issues are raised in Appellants' Brief which contain merit. However, of the issues raised, one is of singular importance not only to the State of Montana, but contains national implications of great importance to the Amici states as well. Therefore, this brief is limited solely to a discussion of that question.

THE ACT DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The amici have previously in this matter filed a brief in support of Appellant's Jurisdictional Statement. At that time we urged this court to accept jurisdiction of this cause because of the importance of the issue raised in this matter. Without merely restating our previous position in this matter we file this brief to urge this court to again uphold the individual sovereign states right to tax independent contractors performing work within their exterior boundaries.

The tax in question is known as the Montana Contractors' Gross Receipts Tax, and is found in Chapter 35, Title 84, Revised Codes of Montana (1947). Basically, the tax is a levy of one percent of the gross receipts earned by public contractors within the State of Montana. The tax is levied on the contractor and not on the public agency. A public contractor is defined as any person performing a contract for the State of Montana or any other public body, including the federal government. The Act provides for a system of refunds and credits, whereby a contractor can receive a cash refund for personal property taxes, or a credit for any corporate income taxes. The tax is levied on all public contractors and makes no distinction, as to the state of incorporation or principal place of business. During the years of the operation of the tax, it has resulted

in revenue being generated for the State of Montana equal to one-half of the amount of the tax collected — i.e. effective tax of ½ percent.[1]

As has been noted previously, the finding of the District Court which causes concern for the Amici is the fact that the Act is rendered unconstitutional under the Supremacy Clause because it generated revenue for the State of Montana.

> "It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G. R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G. R. Tax as a line item in his bid and thus increase the cost of construction, the State would receive as general revenue that portion of the G. R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50 percent of the G. R. Tax. Contra, the Government is required to pay through increased bids by the imposition of the G. R. Tax and gets no return of the over plus of approximately 50 percent." (J.S. App., page 13.)

The reasoning of the District Court is premised on the fact that because the tax levied on contractors performing public work generated tax revenue for the state and not the federal government, Montana was therefore not complying with the rule as established in *Phillips Chemical Co. vs. Dumas Independent School District*, 361 U.S.

[1]The Act has been questioned in the Supreme Court of the State of Montana on two different occasions by the federal government, acting through its contractor Peter Kiewit & Sons, Inc. For a discussion of the history of the Act and the legislative intent, *see Peter Kiewit & Sons Co. vs. State Board of Equalization*, 161 Mont. 140, 505 P.2d 102 (1973) and *Peter Kiewit & Sons Co. vs. Dept. of Revenue*, 166 Mont. 260, 531 P.2d 1327 (1975).

376 (1960). See also *Homestake-Sapin Partners vs. United States*, 375 F.2d 507 (10th Cir. 1967). It is the position of the Amici that the District Court has misread and misapplied the *Phillips Chemical* rule and tested for equality of economic impact at the level of the sovereigns rather than at the level of those who deal with the sovereigns i.e. the contractors. Such a position is directly contrary to the previously established law of this very court.

Beginning with the case of *James vs. Dravo Contracting Co.*, 302 U.S. 134 (1937), this Court upheld as being constitutional a "2%" tax imposed by a state upon the gross receipts of a contractor earned under contracts with the federal government. *See also, Silas Mason Co. vs. Tax Commission of Washington*, 302 U.S. 186 (1937), upholding the validity of an occupation tax applied to gross income received by individuals performing work for the federal government; *United States vs. Boyd*, 378 U.S. 39 (1964), upholding a tax levied by the State of Tennessee on property owned by the federal government, but used by independent contractors in the performance of federal contracts; *Alabama vs. King and Boozer*, 314 U.S. 1 (1941), upholding the validity of a sales tax levied upon contractors operating under a "cost plus a fixed fee" contract with the federal government;[2] *United States vs. City of Detroit*, 355 U.S. 466 (1958), upholding the validity of a state tax levied on the lessee of property owned by the federal government. As stated in *United States vs. City of Detroit, supra*, at 469:

> "At the same time it is well settled that the Government's constitutional immunity does not shield pri-

[2]See also *U.S.A. and Hercules Inc. v. Forst*, 569 F.2d 811 (4th Cir. 1978).

vate parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the government."

The cases make it clear that in order for a tax to be valid, it must (i) not have substantial economic impact on the federal government, (ii) not be levied directly on the federal government; and (iii) not be discriminatory. A review of the tax levied by the State of Montana herein indicates that it falls within these guidelines. It is a tax ¼ as large as the tax levied in the *Dravo* case, *supra* (½ of 1% as opposed to 2%); it is not direct as it is levied on the independent contractors and not on the federal government; and finally, it is not discriminatory as it is levied upon all contractors performing work for any public body, including the State of Montana and all counties, cities and special improvement districts, etc.

Amici would again cite to the court the very recent opinion of *United States vs. County of Fresno*, 429 U.S. 452 (1977) as supporting the position of Appellant and Amici.

> "The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the federal government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the states." 429 U.S. at 462.

Here, the tax is levied on all similarly situated constituents, all contractors doing work for any public agency. All similarly situated constituents are taxed, as required by this court. Montana has treated all contractors dealing with public bodies in the same way, levying a tax on their gross receipts. A contractor performing work for the State of Montana (or any of its

inferior governments), as opposed to a contractor performing work for the federal government, has been given no advantage. Rather, the "discrimination" that the majority opinion speaks of relates to the fact that the tax generated reduces the cost the state government ultimately has to pay. The test set forth in the *Fresno* case, *supra*, or the *Phillips Chemical* case, *supra*, does not, as the lower Court found, make invalid a state tax levied on contractors performing work for the federal government merely because the monies end up in the coffers of the state treasury. Rather, they require that if a tax is to be levied on a federal contractor, a like and equal tax must be levied on a state contractor, as the Act provides.

The imposition of taxes under statutes such as the Act in question here, have been upheld by this Court and with Congressional approval. It is for Congress to act if and when such taxes by any of the various states become unduly burdensome or restrict governmental function:

> "If they unduly intrude upon the business of the Nation, it is for Congress, in the valid exercise of its proper powers, not this Court, to make the desirable adjustment."
>
> *United States vs. Boyd*, 378 U.S. 39, 51 (1964). See also *United States v. State ex rel. Beko*, 88 Nev. 76, 493 P.2d 1324 (1972).

Additionally, the reasoning of the majority opinion, if adopted by this Court, would have a very serious and far reaching effect on the vital issue of inter-sovereign taxation. As Judge Kilkenney in his dissent pointed out, (J.S. App. 28-29), and as the Amici readily agree, if the

reasoning of the majority is allowed to stand, this opinion overrules previous decisions of this Court. Although the government presently states that this opinion, if adopted, does not overrule this Court's previous decisions (M.A. pp. 9-10), it remains a vital concern to the Amici that this Court again reestablish the principal of allowing the states to properly exercise their rights within their own sphere of taxation. The states are not attempting to lay a tax directly on the United States or one of its agencies, but are taxing only those independent instrumentalities operating within their boundaries. As pointed out by this Court in *M'Culloch vs. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the right of taxation resides within and is an inheritent power of the state. An affirmance of the decision of the majority herein would be to revert to the law as exemplified in the case of *Panhandle Oil Co. vs. State of Mississippi*, 277 U.S. 218 (1928). It is important that this Court again re-establish this principal continuously under attack by the Government and allow the sovereign individual states to levy nondiscriminatory taxes upon independent contractors performing work within their boundaries.

CONCLUSION

This issue is of tremendous concern to the Amici and truly represents a question having nationwide impact in the field of inter-sovereign taxation. Therefore, we respectfully urge this Court to reverse the decision of the majority and hold as constitutional the Montana Contractors Gross Receipts Tax Act.

Respectfully submitted,

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